No. 17-1107

IN THE

Supreme Court of the United States

MIKE CARPENTER, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Petitioner,

v.

PATRICK DWAYNE MURPHY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* OF FORMER UNITED STATES ATTORNEYS TROY A. EID, BARRY R. GRISSOM, THOMAS B. HEFFELFINGER, DAVID IGLESIAS, BRENDAN V. JOHNSON, WENDY J. OLSON, TIMOTHY Q. PURDON AND DANNY C. WILLIAMS, SR. IN SUPPORT OF RESPONDENT

TROY A. EID
Counsel of Record
JENNIFER H. WEDDLE
HARRIET MCCONNELL RETFORD
GREENBERG TRAURIG, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500
eidt@gtlaw.com

Counsel for Amici Curiae

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QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici Curiae are all former United States Attorneys, appointed by Republican and Democratic Presidents and confirmed by the United States Senate, with extensive direct experience prosecuting crimes arising in Indian country and well-versed in the jurisdictional interplay among Federal, State and Tribal authorities responsible for public safety and the administration of justice.

Amici have actively participated in the legislative process by which Congress has enhanced coordination and cooperation among Federal, State and Tribal law enforcement jurisdictions by enacting statutes such as the Violence Against Women Act Amendments of 2013, PL-113-4 ("VAWA 13"), and the Tribal Law and Order Act of 2010, Pub.L. 111–211, H.R. 725, 124 Stat. 2258 ("TLOA"). These and other laws attest to Congress' demonstrated recent ability to adjust the appropriate scope of Federal jurisdiction in Indian country when the interests of justice require it, and with due respect and consideration for the public safety needs of States and Tribes alike.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that no part of this brief was authored by counsel for any party, and no such counsel or party made a monetary contribution to the preparation or submission of the brief. Counsel of record received timely notice of intent to file this brief and have consented.

SUMMARY OF THE ARGUMENT

Given the obligations solemnly agreed to by the United States in the Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, it is Congress' exclusive role to assess and, as may be needed, adjust the jurisdictional division of authority among Federal, State and Tribal law enforcement and prosecutorial authorities on the Muscogee (Creek) Reservation ("Reservation"). Under our Constitution, Congress is the proper forum in which representatives of all three sovereigns can deliberate matters of public safety and the administration of justice on the Reservation, including the appropriate scope of Federal, State and Tribal criminal jurisdiction.

The United States asked this Court to accept review of this case because "[t]he federal government lacks sufficient investigatory and prosecutorial resources in the area to handle that volume of cases; the FBI currently has the equivalent of seven agents for all of eastern Oklahoma." United States Brief in Support of Certiorari at 22. The United States has sensibly not pressed this argument on the merits. It is properly addressed to Congress, not this Court, because Article I, Section 8 of the United States Constitution expressly delegates to Congress exclusive authority to regulate commerce with Indian tribes. Laws enacted by Congress beginning in the 1790s regulating sales, leases and other conveyances of tribal land and trade and interactions with Indian tribes remain substantially in effect. *See* 25 U.S.C. §§ 177 and 261-264. Many treaties between the United States and Indian tribes – which, like laws enacted by Congress, are the law of the land under the Supremacy Clause of the Constitution – and any abrogation of

such treaties are the exclusive province of Congress. *See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999); and *United States v. Dion*, 476 U.S. 734 (1986). Questions as to how law enforcement and prosecution resources can be most effectively allocated among Federal, State and Tribal officials and institutions do not fall within the province of judges; they are rather the essence of lawmaking. Congress has demonstrated its ability to address the inter-relationship of Federal, State and Tribal jurisdiction in Indian country, including in the recent past by enacting VAWA '13 and TLOA, and through statutes adjusting the scope of jurisdiction on particular reservations. Congress' time-tested plenary power over Indian affairs, including within the treaty-making context, should be respected here.

ARGUMENT

I. The authority to abrogate treaties is exclusively vested in Congress.

"The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). That "first and governing principle" is the alpha and the omega of analysis in this case. "[T]hough petitioners wish that Congress would have spoken differently . . . we cannot remake history." *Nebraska v. Parker*, 136 S. Ct. 1072, 1082 (2016) (quotation omitted).

Whether federal and tribal jurisdiction is the most effective approach to governing this section of Oklahoma is fundamentally irrelevant. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots

within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.*

The act of abrogating a treaty or disestablishing a reservation is of the utmost seriousness, requiring "an act of Congress, passed in the exercise of its constitutional authority. . . clear and explicit." *United States v. Dion*, 476 U.S. 734, 738 (1986), quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

"The whole intercourse between the United States and [the Tribe], is, by our constitution and laws, vested in the government of the United States." *Worcester v. The State of Georgia*, 31 U.S. 515, 561 (1831). Any state law or action to the contrary "is consequently void." *Id.* "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). "This Court has repeatedly rejected state attempts to assert sovereignty over Indian lands." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 148 n.40 (1996).

Judicial determinations as to the actual or perceived resource needs of law enforcement officers and prosecutors on Indian reservations are not an appropriate ground for abandoning these well-established principles. Many other important legal principles have "controversial public safety implications," including all constitutional and other legal provisions "that impose restrictions on law enforcement and on the prosecution of crimes." *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010). The exclusionary rule, for example "generates substantial social costs which sometimes include setting the guilty free and the dangerous at large." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quotation omitted).

Likewise, "Indian treaty rights are too fundamental to be easily cast aside." *United States v. Dion*, 476 U. S. at 739. "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate." *Worcester*, 31 U.S. at 556-57. These are fundamental principles rooted in the separation of powers and the authority of Indian tribes as sovereign states. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) ("A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations.").

Petitioners' arguments are properly addressed to Congress. The give-and-take of the legislative process provides the proper forum in which the interests of Federal, State and Tribal officials can be deliberated and addressed with due consideration for the interests of all concerned. The Constitution demands no less, and does so to address a fundamental flaw in the text of the Articles of Confederation, which read: "The United States in Congress assembled shall also have the sole and exclusive right and power of...regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[2] This provision in the Articles gave authority to regulate trade with Indians to both the Continental Congress and to the States within their borders.

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[2] Articles of Confederation, Art. IX, 1 U.S.C. Organic Laws.

In the Federalist No. 42, James Madison described the purpose of the Indian Commerce Clause:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

II. Through its exercise of legislative authority, Congress has adjusted the scope of criminal jurisdiction in Indian country, both nationally and locally.

Congress has demonstrated its ability to address the proper division of responsibility and authority among Federal, State and Tribal officials through the legislative process, including with respect to the scope

of criminal jurisdiction and resources among the three sovereigns. To give just two examples, Congress enacted TLOA "to clarify the responsibilities of Federal, State, tribal, and local governments with respect to crimes committed in Indian country; . . . (3) to empower tribal governments with the authority, resources, and information necessary to safely and effectively provide public safety in Indian country; (4) to reduce the prevalence of violent crime in Indian country and to combat sexual and domestic violence against American Indian and Alaska Native women." TLOA § 202.

TLOA provides that Tribes may impose sentences of more than one year (but not more than three years) if they "provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction." *Id.* at § 234(c)(2). Tribes must also provide a judge who is law trained and a licensed attorney, publish their criminal codes, and maintain a record of the proceeding. *Id.* at § 234(c)(3)-(5). Other key TLOA provisions include training requirements so that Tribal law enforcement may be Federally deputized to enforce Federal criminal law within Indian country.

VAWA '13 recognizes Tribes' inherent jurisdiction over non-Indians in certain domestic violence cases. 25 U.S.C. § 1304; 25 U.S.C. § 1304 note 2. Under this legislation, Tribes electing to do so may assume jurisdiction over non-Indians on tribal lands to prosecute several specific domestic violence offenses under tribal law. 25 U.S.C. § 1304. VAWA '13 partially repeals this Court's decision in *Oliphant v. Suquamish*

Tribe of Indians, 435 U.S. 191 (1978), which held that Indian tribes lack criminal jurisdiction over non-Indians. As with TLOA, VAWA '13 requires participating tribes to respect all constitutional rights of the defendants including the provisions of counsel for indigent defendants and to have a judge licensed in the practice of law. *Id.* at § 1304(d); 25 U.S.C. § 1302(c).

VAWA '13 is shaping the scope of concurrent Federal-Tribal jurisdiction in Oklahoma and other states. As of last March, 19 Federally recognized tribes have prosecuted non-Indian criminal defendants pursuant to VAWA '13, resulting in 74 convictions and five acquittals, with 24 cases pending.[3] The populations of the reservations of the participating tribes range from almost entirely Native American to fewer than 23 percent and include the Tribe and other tribal governments in Oklahoma. *Id.* at 18.

These are just the most recent in a long string of legislative enactments dealing with criminal jurisdiction in Indian country. *See for example*, the General Crimes Act of 1817, 18 U.S.C. § 1152; the Major Crimes Act (1883), 18 U.S.C. § 1153, Public Law 83-280 (1953, amended 1968), 18 U.S.C. § 1162; 25 U.S.C. § 1360, and the Indian Civil Rights Act (1968), 25 U.S.C. § 1301.

Congress has also demonstrated its ability to address the scope of Federal, State and Tribal criminal jurisdictional issues by adjusting specific reservation boundaries. For example, PL-98-290, 98 Stat. 201 (May 21, 1984), demarcated the boundaries of the

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[3] National Congress of American Indians, VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report (March 20, 2018) at 7, available at *http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf*.

highly allotted Southern Ute Indian Tribe's reservation in southwestern Colorado and clarified the allocation of criminal jurisdiction within those boundaries. Notably the largest community on that reservation, the Town of Ignacio, was specifically placed under state criminal and civil jurisdiction at the request of the tribe and with its consent, PL-98-290 § 5.

More recently, PL 113-232, the Blackfoot River Land Exchange Act of 2014 was enacted "to resolve the land ownership and land use disputes resulting from realignment of the River by the [U.S. Army] Corps of Engineers during calendar year 1964 pursuant to the project described in subsection (a)(4)(A); and (2) to achieve a final and fair solution to resolve those disputes." PL 113-232, § 2(b).

Congress currently is considering "[a]n Act to confirm undocumented Federal rights-of-way or easements on the Gila River Indian Reservation, clarify the northern boundary of the Gila River Indian Community's Reservation, [and] . . . take certain land located in Maricopa County and Pinal County, Arizona, into trust for the benefit of the Gila River Indian Community." H.R. 4032. This bill has passed the House and is currently before the Senate. The Senate is also considering, S. 2788, "A bill to repeal the Act entitled "An Act to confer jurisdiction on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation," currently in committee.

These examples do not include recent acts of Congress taking land into trust on behalf of Tribes, recognizing or restoring Tribes, or approving water rights

settlements – all of which deal with specific issues of Indian reservation boundaries and property rights.[4]

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[4] For example in 2018 the Senate Committee on Indian Affairs held at least six hearings on land legislation specific to individual tribes, *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; ***Legislative Hearing to receive testimony on S. 2154, S. 3060 and S. 3168*** (July 18, 2018)(regarding S. 2154, Kickapoo Tribe in Kansas Water Rights Settlement Agreement Act and S. 3168, A bill to amend the Omnibus Public Land Management Act of 2009 to make Reclamation Water Settlements Fund permanent); ***Legislative Hearing to receive testimony on S. 2599*** (July 11, 2018)(regarding S. 2599, the Leech Lake Band of Ojibwe Reservation Restoration Act); ***Business Meeting to consider H.R. 597, the Lytton Rancheria Homelands Act of 2017*** (July 11, 2018); ***Business Meeting to consider H.R. 1491, the Santa Ynez Band of Chumash Indians Land Affirmation Act of 2017*** (June 13, 2018); ***Legislative Hearing to receive testimony on the following bills: H.R. 597 & H.R. 1491*** (April 25, 2018)(regarding H.R. 597, A bill to take lands in Sonoma County, California, into trust as part of the reservation of the Lytton Rancheria of California, and for other purposes; and H.R. 1491, A bill to reaffirm the action of the Secretary of the Interior to take land into trust for the benefit of the Santa Ynez Band of Chumash Mission Indians, and for other purposes); ***Business Meeting to Consider S. 995 & S. 1953*** (Feb. 14, 2018)(regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017). During the same period, the Committee also held hearings on issues and legislation related to criminal justice in Indian country. *See*, United States Senate Committee on Indian Affairs website: Hearings (listing committee hearings and providing links to testimony and materials), available at https://www.indian.senate.gov/hearings; *Oversight Hearing on "Justice for Native Youth: The GAO Report on 'Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency' "*

It is not necessary to construe the historic statutes relied on by Petitioners in "a backhanded way," *Menominee Tribe*, 391 U.S. at 391, when Congress continuously demonstrates its ability to use the legislative process to address the balance of powers among the three sovereigns.[5]

(Sep. 26, 2018); *Oversight Hearing on "Protecting the Next Generation: Safety and Security at Bureau of Indian Education Schools"* (May 16, 2018); *Oversight Hearing on "Opioids in Indian Country: Beyond the Crisis to Healing the Community" (Mar. 14, 2018); A Listening Session on "Addressing Gaps in Protections and Services for Native Women"* (Feb. 12, 2018); and *Business Meeting to Consider S. 995 & S. 1953* (Feb. 14, 2018)(regarding S. 995, the Spokane Tribe of Indians of the Spokane Reservation Equitable Compensation Act S. 1953, the Tribal Law and Order Act Reauthorization and Amendments Act of 2017).

[5] Indeed, Amici have variously testified individually before Congress on these topics numerous times as Congress carefully considers the experiences of the stakeholders, including law enforcement officers. *See e.g., Examining Federal Declinations to Prosecute Crimes in Indian Country: S. Hrg. 110-683 Before the S. Comm. on Indian Affairs*, 110th Cong. 31 (2008)(statement of Thomas B. Heffelfinger); *Hearing on S. 1763, Stand Against Violence and Empower Native Women Act; S. 872, A Bill to Amend the Omnibus Indian Advancement Act to Modify the Date as of which Certain Tribal Land of the Lytton Rancheria of California is Considered to be Held in Trust and to Provide for the Conduct of Certain Activities on The Land*; S. 1192, *Alaska Safe Families and Villages Act*, S. Hrg. 112-489, 112th Cong. 22 (2011) (statement of Thomas B. Heffelfinger); *Law Enforcement in Indian Country, Hearing Before the S. Comm. On Indian Affairs*, S. Hrg. 110-136, 110th Cong. 62 (2007) (statement of Thomas B. Heffelfinger); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs*, 112th Cong. 31-32 (Sept. 22, 2011) (statement of Brendan V. Johnson, U.S. Attorney, District of South Dakota); *Tribal Law and Order One Year Later: Have We Improved Public Safety and Justice*

III. Congress is best situated to determine the public safety needs and requirements of the Reservation with due consideration of Federal, State and Tribal concerns.

"It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), but only within the limited options presented by the case before the Court. This Court faces a binary choice: Either a rural road in Henryetta, Oklahoma is part of the Creek Reservation or it is not, and thus either the State court had criminal jurisdiction or it did not.

Congress has no such limitations. It is not constrained to debate the meaning and purpose of Allotment Era statutes; instead, Congress has the authority to hold hearings on the present capacity of the Tribe to provide criminal justice services, and to take testimony from both State and Tribal officials and others regarding how they would prefer to distribute responsibility and jurisdiction. Congress is the only branch of government that has that has the tools at its disposal to reach a solution regarding the Creek

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Throughout Indian Country, Oversight Hearing Before the Senate Committee on Indian Affairs, 112th Cong. (Sept. 22, 2011) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014)(testimony of Timothy Q. Purdon, U.S. Attorney, District of North Dakota); *Oversight Hearing on the Law and Order Commission Report: "A Roadmap for Making Native America Safer": Before the S. Comm. on Indian Affairs*, 113th Cong., 2nd Session (2014) (testimony of Troy A. Eid, Chairman, Indian Law and Order Commission).

Reservation that is respectful and practical.

More specifically, Congress has numerous options when faced with issues such as the appropriate scope of Federal, State and Tribal criminal jurisdiction in Oklahoma. For instance, Congress might leave the Reservation fully or partially intact and provide additional funding and support for tribal and federal law enforcement. The Federal government already funds several important programs to improve criminal justice in Indian country, and these or similar programs could be expanded to address the concerns raised by the State of Oklahoma and others.

In the years 2014 and 2015, BIA funding for law enforcement programs was $213.0 million and $212.0 million, with 37% spent on BIA direct service programs and the remainder on tribally run programs.[6] BIA funding for detention and corrections programs was $105.4 million and $108.9 million and for tribal courts was $29.3 million and $29.4 million. *Id.* Other programs are run out the Department of Justice, including the Tribal Courts Assistance Program, which provides grants to support tribal justice systems, authorized by 25 USC 3689(a) (Public Law 106-559) (25 USC 3689(a)) and the Tribal Civil and Criminal Legal Assistance Program (TCCLA), authorized by 25 U.S.C. 3651, *et seq.* (Public Law 106-559). Congress can provide additional funding to the Creek Tribe to help it take on its increased responsibilities. And, of

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[6] Bureau of Indian Affairs – Office of Justice Services, Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country (Sept. 17, 2017) at 2, available at https://www.bia.gov/sites/bia.gov/files/assets/bia/oja/ojs/pdf/Report_Final-Cleared.pdf.

course, it can expand the Federal law enforcement resources available in this part of Oklahoma.

Second, Congress could pass specific legislation regarding the division of responsibilities and criminal jurisdiction between the Tribal, State and federal governments. Just as PL-98-290 carved out the largest town on the Southern Ute Reservation and placed it under state criminal jurisdiction, Congress could place the city of Tulsa and surrounding communities under State criminal jurisdiction or provide for concurrent jurisdiction. Congress might alternatively provide for concurrent state and tribal jurisdiction over the state of Oklahoma just as it has for Alaska, California, Minnesota, Nebraska, Oregon and Washington in PL-83-280 (18 U.S.C. § 1162, 28 U.S.C. § 1360).

Third, Congress could redraw the boundaries of the Creek Reservation to include areas that remain heavily Creek, while excluding areas that have a predominantly non-Indian character. Because Congress's powers extend beyond simply drawing boundaries, such legislation could include provisions that would recognize, support and expand the sovereignty of the Tribe on its remaining reservation, such as assisting with the reacquisition of Tribal trust lands, and strengthening Tribal civil jurisdiction and taxing authority.

Another issue which has not been emphasized by litigants or *amici*, but which might lend itself to deliberation in the Congressional law-making process, is the application of 18 U.S.C. § 3598, which provides that "no person subject to the criminal jurisdiction of

an Indian tribal government shall be subject to a capital sentence under this chapter for any offense the Federal jurisdiction for which is predicated solely on Indian country (as defined in section 1151 of this title) and which has occurred within the boundaries of Indian country, unless the governing body of the tribe has elected that this chapter have effect over land and persons subject to its criminal jurisdiction." Under this Federal statute, capital punishment may only be imposed for crimes arising on the Reservation committed by Indians if the Tribe consents.

These examples are illustrative only; amici do not suggest that they are necessary or desirable. Whichever combination of scenarios that might arise in response to the decision by the court below, "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S. at 470.

As in the interstate commerce context, Congress has the final say over reservation boundaries and it can change the rule challenged here based on its considered review of the issues and priorities involved. The Congressional forum is best suited to ensure participation by the State and the Tribe in that dialogue. Congress alone has the constitutional expertise and authority to address changes to the reservation policies that have persisted for several hundred years.

* * *

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

TROY A. EID
Counsel of Record
JENNIFER H. WEDDLE
HARRIET MCCONNELL RETFORD
Greenberg Traurig, LLP
1200 17th Street, Suite 2400
Denver, CO 80202
(303) 572-6500
Counsel for Amici Curiae